IN THE

SUPREME COURT OF THE UNITED STATES.

OZARK PIPE LINE CORPORATION,
Appellant,

v.

ROY MONIER and GEORGE M. HAGEE, Constituting the State Tax Commission of the State of Missouri, and JESSE W. BARRETT, Attorney-General of the State of Missouri,
Appellees.

No. 575.

Appeal from the District Court of the United States for the Western District of Missouri.

REPLY BRIEF FOR APPELLANT.

The principal contention of the appellees is that the office of the company in St. Louis is its main office, and for this reason the appellees attempt to distinguish this case from the case of Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114. We believe, however, that it is well settled that a company which is doing an interstate business only is not subject to an occupation tax by any state on

account of the maintenance of the principal office of the company within such state. This is true whether the state be the one where the company is incorporated or any other state. The case of Philadelphia & Southern Mail Steamship Company v. Pennsylvania, 122 U. S. 326, ruled that such a tax could not be levied by the state in which the company was incorporated. Many corporations certainly, and probably the majority of corporations, have their principal office in the state where they are incorporated, and if they do an interstate business only they are not subject to privilege taxes levied by the state. The principle, therefore, that the state of domicile of the corporation cannot levy a privilege tax upon such corporation is itself sufficient to indicate that the maintenance of the principal office within the borders of the state will not subject such a corporation to the payment of a privilege or excise tax.

In commenting upon the case of Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114, the appellees state that the main office of the company was at Roanoke, Virginia, and that the office at Philadelphia was not the main office. The appellees add that the business of the railroad was conducted and directed from the main office at Roanoke, Virginia. The opinion, however, does not indicate

this. The finding of facts of the lower court is set out at page 116. The fourth finding is as follows:

> "From July 1, 1883, to July 1, 1885, it had an office in this commonwealth for the use of its officers, stockholders, agents and employes. The main office is at Roanoke, Virginia."

By the term "main office" the Court may well have intended the office required by law to be maintained in the state of the corporation's domicile, to wit, Virginia. The finding of facts shows that the Philadelphia office was for the use of the company's officers, stockholders, agents and employes. The fact that it was for the use of the officers of the company would indicate that the business was directed there, and the fact that the office was for the use of both the officers and stockholders would indicate that it was the principal office of the company. Furthermore, there is nothing in the opinion which in any way intimates that the ground of the decision is that the office in Pennsylvania was merely a branch office and that the company would have been taxable if said office had been the principal office of the company. We do not believe that this case can be distinguished from the case at bar upon the theory that the office maintained by the Norfolk & Western Railroad Company was merely a branch office, whereas the office maintained by the appellant in St. Louis is

its principal office. In this connection, we further call the Court's attention to the following cases:

Clyde S. S. Company v. City Council of Charleston, 76 Fed. Rep. 46: This is a decision by the Circuit Court of the District of South Carolina. It is, however, interesting on account of its review of several decisions by this Court, to which we have already called the Court's attention in our former brief. We quote the syllabus:

> "A foreign corporation, whose vesse'ls, while en route between the ports of two different states, stop at a port of a third state, is not liable for a license tax at that port, because it there leases a wharf or landing; has plant and machinery for the taking in and discharge of freight and passengers; engages stevedores and longshoremen, who are in its sole employment; has there an agent and subordinate clerks, an office, with furniture, books and appliances; and keeps a bank account and occasionally purchases supplies there—since all such operations are an essential and integral part of its interstate commerce business."

People of the State of New York ex rel. Pennsylvania Railroad Company v. Wemple, 138 New York 1, 19 L. R. A. 694: In this case it was held that the State of New York was without authority to levy a tax on the franchise or business of the Pennsylvania Railroad Company, which company was engaged in

no business within the State of New York other than an interstate business. The evidence showed that the lines of the Pennsylvania Railroad Company were connected with the State of New York only by a ferry across the Hudson River and that the company had within the State of New York terminal facilities, wharves, piers, docks and buildings. The Court puts the question thus:

"We come, therefore, to the crucial question in the case, Can the State of New York tax the relator, a foreign corporation, upon its business carried on in this state, which is exclusively the business of interstate commerce? The question stated in another form, is, May a state tax a foreign corporation whose business in such state is exclusively that of interstate commerce, for the privilege of transacting that business here, because, as we have held, this is the essential nature of the tax under the Act of 1880."

The Court then considers numerous decisions of this Court, including the case cited by the appellees, of Maine v. Grand Trunk Railroad Company, 142 U. S. 217, and reaches the conclusion that the tax attempted to be levied was invalid.

The exemption of interstate commerce from occupation taxes levied by the states necessarily extends to all of the means and implements used in such commerce. There can be no question that such a tax cannot be sustained upon the ground that the company

owns property within the state. Such property is, of course, taxable, but its ownership by the company cannot be made the basis for a privilege or excise tax. It is also well settled that the maintenance of an office for the agents of the company within the state cannot be made the basis for the levying of such tax.

But the appellees argue that if the principal office of the company is maintained within the state these principles do not apply, and that the maintenance of such office by the company can be laid hold of by the state as a ground for the levying of a privilege tax against it. The principle, however, which allows a corporation engaged solely in interstate commerce to own property and maintain offices within the confines of the state without being subjected to occupation taxes will clearly allow the maintenance of a principal office within the state. The principal office is just as much concerned with the business of the company as any branch office or any property owned by the company—in fact it is more so. The president of the company is just as much engaged in interstate commerce as is an employe who operates a pump. The management and direction of the company's business is just as much a part of interstate commerce as is the operating of the machinery at pumping stations. This Court certainly has never recog-

nized in any reported decision any such exception to the general rule, an exception which, if recognized, would render every corporation engaged solely in interstate commerce liable to the payment of a tax upon such commerce by the state in which it maintained its principal office. If interstate commerce is to be effectually protected from occupation taxes levied by the states, such protection must extend to the operation of the principal office of the company. There is no logical reason why it should not do so.

The appellees state, at page 29 of their brief, as follows:

> "The amount or extent of business done within the state is immaterial. If it does any intrastate business at all it is subject to the Franchise Tax Act of Missouri."

The position of the appellee is, therefore, that if they can persuade the Court that the appellant does any business at all of an intrastate character it will be subject to a franchise tax. In other words, if it is doing business within the state to maintain a truck, which operates for the maintenance of the pipe line, or to make purchases for the pipe line within the state, or to maintain an office in the City of St. Louis, then the company must pay a franchise tax upon a percentage of its entire capital stock and surplus measured by its property within the state. This tax,

it is to be remembered, is an excise, privilege or occupation tax upon the franchise of the company. It is not a tax for the operation of a truck; such a tax the company pays. The evidence shows that automobile license taxes are paid by the company.

Nor is it a tax which is levied in terms for the privilege of maintaining an office within the state. In this respect the act is far more drastic and far-reaching than were the acts considered in the cases of Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114, and Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania, 125 U. S. 181.

The effort of the taxing authorities here is to find some one or more activities, any activities, engaged in by the company, which may be called intrastate commerce, and thereupon to levy a tax, not upon such activities alone, but upon a proportion of the franchise of the company measured by the property owned by the company in Missouri. If this company could be shown to transport at times single barrels of oil from one point in Missouri to another point in Missouri, it would be doing an intrastate business, but the tax would be out of all proportion to the intrastate business done. The fact is, however, that the company engages in no such business, and the state, therefore, tries to persuade the Court that the maintenance of an office in Missouri is doing an intrastate business or that the operating of a telegraph or telephone line

along the right of way, and the operating of automobile trucks to carry men and material for the purpose of operating and maintaining the pipe line is intrastate business. Such activities, however, are purely incidental, and even if the law were that such business constituted intrastate commerce, it would be a grossly unfair and inequitable thing to justify on that account a tax against the general franchise of the company based upon the amount of property owned in the state. Fifty per cent of the company's property lies within the State of Missouri. One hundred per cent of its revenues are derived from interstate commerce. It is clear enough that the franchise which the state attempts to tax here is the right to engage in interstate commerce. That right is a valuable right which is not subject to privilege taxes by the state, and it is certainly contrary to reason and authority to say that that right may become subject to taxation if the company engages in any activities within the state which are of such a nature that they might be regarded as intrastate business were they not inseparably connected with the business of the company, which is that of interstate commerce.

The amount of a tax should have some reference to the value of the thing taxed. The right to tax an auto truck is one thing and the right to tax the general franchise of a company engaged in interstate com-

merce for the reason that it operates an auto truck is quite another and different thing.

The appellees cite the case of Pennsylvania Railroad Company v. Knight, 192 U. S., page 28. In this case it was held that the operating of cabs which conduct passengers to and from a railroad station is no part of interstate commerce and is, therefore, subject to taxation. In the opinion the Court says:

> "We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation."

The Court also points out that:

> "Many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it."

There are two points to be noted here:

First. The tax was a tax upon the operation of the cab itself. The operation of the cab was not asserted by the State to be a reason for the levying of a franchise tax upon some railroad company or other public service corporation.

Second. The cab service was a thing which, in its nature, was quite separate from and independent of the conduct of interstate commerce, but in the present case all of the activities engaged in by the com-

pany are an inseparable part of the business of operating and maintaining the pipe line.

Interstate commerce, as this Court has ruled and as the appellees point out, is a practical conception. If the tax in question is in its practical effect and operation a burden upon interstate commerce, it is void. Now, there can be no question that this tax in its practical effect and operation is a distinct burden upon interstate commerce. Even if the company did some intrastate business, the amount of property owned in Missouri can have no possible relation to the amount of intrastate business done, and to ask this Court to sustain the tax upon the theory that the maintenance of auto trucks for the sole purpose of operating and maintaining the pipe line is doing business within the state, is tantamount to requesting the Court to sustain a tax, upon interstate commerce which is large in amount on account of a supposed operation within the state which is trivial in amount and purely incidental in character.

Furthermore, it is well settled in cases which we have previously cited that the maintenance of a railroad station or of wharves and depots within the state by a company doing an interstate business only will not subject the company maintaining them to an occupation tax by the state. Now, if is well known that at every railroad station and at every wharf and de-

pot there are trucks used, and station agents and porters are employed, but all of such activities are incidental to the commerce in which the company is engaged.

The appellees call the Court's attention to the case of Maine v. Grand Trunk Railroad Company, 142 U. S. 217. In that case the tax was levied upon the company

> "for the privilege of exercising its franchises within the State of Maine."

As we read the case, it is one of a line of numerous decisions holding that where a company does both interstate and intrastate business, the state has the right to tax the intrastate business. The opinion in the case was chiefly concerned with the method of determining the tax and not with the right to levy any tax at all.

The Supreme Court of New Jersey, we believe, placed a wrong interpretation upon the case of Maine v. Grand Trunk Railway Company, supra, in deciding the case of Tide Water Pipe Company v. State Board of Assessors, 57 N. J. 516. The New Jersey Court interpreted the decision in the case of Maine v. Grand Trunk Railway Company as ruling that a state could levy an occupation tax upon a company doing a wholly interstate business, but the

decision in the Grand Trunk Railway Company case was not to that effect. As we have above pointed out the statute of Maine levied a tax for the privilege of exercising the franchises of the company within the State of Maine. Now, there is no question that where a company does an intrastate business such business may be taxed by the state. In such cases the only question arising is as to the validity of the method used in determining the tax, and that was the question which was before this Court in the case of Maine v. Grand Trunk Railway Company, 142 U. S. 217. In the case of the Tide Water Pipe Company v. State Board of Assessors, 57 N. J. 516, the Court was considering the right of the State of New Jersey to levy a tax upon a pipe line company which did a purely interstate business, and the Court says that the case of Maine v. Grand Trunk Railway Company was on all fours with the case then before it. In so ruling, the Supreme Court of New Jersey clearly erred and misinterpreted the decision in the Grand Trunk Railway Company case.

We would further call the Court's attention to the following provisions of the Revised Statutes of Missouri, 1919:

"Taxation of Franchises.

"Section 12999. To be assessed, how—tax due and payable, when.—The franchises (other than

the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all quasi public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation (R. S. 1909, Section 11551).

"Section 13000. Valuations, how fixed and by whom.—The State Board of Equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations whose property the State Board of Equalization is now or may hereafter be required to assess, and the County Assessor, in case of the other quasi public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and in-

> tangible, in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the Assessor's books, under the head of 'all other property' (R. S. 1909, Section 11552)."

In the present case the evidence shows that the appellant pays ad valorem taxes levied upon property. That tax is not levied upon the right of way considered at the value of farm property. It is levied upon the right of way considering its value as such. The company has always acquiesced in this tax. The tax in question here, however, is an additional burden placed upon the occupation in which the company is engaged, and we submit cannot be sustained as against any corporation doing solely an interstate business.

Respectfully submitted,

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